83-587
No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

vs.

CLARENCE E. BENNETT ET AL.,
Respondents.

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner

vs.

DAN R. SANDFORD ET AL.,
Respondents

(CONSOLIDATED)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1976 & Supp. V 1981), create a federal treble damage cause of action and a federal forum for garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims?

2. Does this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) compel the federal courts to grant standing, jurisdiction, and a cause of action to consumers who cannot allege any commercial harm proximately caused by a violation of the Act but, to the contrary, seek treble damages for alleged mail fraud?

3. Is a mortgage lender deemed as a matter of law to be "associated with" its borrowers within the meaning of the statute so as to make it liable for their alleged misconduct?

PARTIES IN THE COURT OF APPEALS

The plaintiffs in this case are approximately 400 of the more than 2500 residents of John Knox Village, a retirement community located near Kansas City, Missouri (the "Village"). The defendants are the promoter of the Village, Kenneth Berg; various directors and managers of the Village, including its former attorney and accountant; various corporations affiliated with the Village; and Petitioner here, The Prudential Insurance Company of America ("Prudential"), which is the mortgage lender to the Village.[1]

[1] The dismissal of the complaint against the not-for-profit corporation that operates the Village, John Knox Village, Inc., was affirmed. A complete list of the plaintiffs is set forth in Appendix F hereto. The remaining corporate defendants are: Christian Services International, Inc.; Evangelical Christian Social Services; John Knox Communities, Inc.; National Village Church Center; National Gerimedical Hospital and Gerontology Center; and Westminster Gerontology Foundation, Inc. The other defendants are the accounting firm of Snyder, Grant & Muehling; Kenneth, Jeanne and Irene Berg; Don Williams; George West; G. Dennis Sullivan; A. Glenn Sowders; Jess Garrison; Floyd Sauer; Lee Thomas; Harvey Beck; Jerald Mahanke; Chris Coates; Glenn Smead; Maude Walker; Paul Edwards; James Smith; Harvey Arbonies; Elson Herndon; Mike Swingle; Lottie Jones; Irma Waddell; Ben Weaver; and Lee Felsburg.

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OPINIONS BELOW

The Honorable William R. Collinson in the United States District Court for the Western District of Missouri granted defendants' motions to dismiss, holding that the plaintiffs had failed to state a cause of action under the RICO Act and, therefore, that the federal court lacked jurisdiction. A copy of that opinion, which was not reported, is set forth in Appendix D.

An appeal was taken by the plaintiffs, and on August 11, 1982 a panel of the United States Court of Appeals for the Eighth Circuit issued its decision, reversing in large part and remanding the case for trial. A copy of the panel's opinion, which is reported at 685 F.2d 1053, is submitted herewith as Appendix B. The defendant appellees' requests for rehearing en banc were granted, and on July 11, 1983, the en banc court rendered its opinion and affirmed the panel's result.[2] A copy of the en banc court's opinion, which is reported at 710 F.2d 1361, is submitted herewith as Appendix A.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal jurisdiction in this case is predicated entirely upon the Racketeer Influenced and Corrupt Organizations Act ("RICO Act" or "Act"), 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981) because there is no other federal question and there is not complete diversity among all the parties.

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[2] Since the en banc court "adhere[d] to the views expressed by the panel", both opinions are discussed herein. *Bennett v. Berg*, 710 F.2d. 1361 at 1361, 1364 (8th Cir. 1983) (affirming and adopting the panel's opinion in *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982)).

STATUTORY PROVISIONS INVOLVED

This case turns on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981), which is set forth in the Statutory Appendix.

STATEMENT OF THE CASE

Plaintiffs seek to bring their civil fraud case under the treble damages provisions of the RICO Act, even though their case involves neither the racketeering nor the ill-gotten gains at which Congress aimed the treble damage remedy.

The plaintiffs live in a retirement community called John Knox Village. Prudential financed the construction of the Village and has no direct contractual relationship which is at issue here with any of the plaintiffs. Although most of them have continued to reside in the Village and receive its promised services, plaintiffs here claim that the value of their non-transferable occupancy agreement is less than they had anticipated. To attempt to bring their claims under the Act, plaintiffs accuse the thirty-three defendants of mail and wire fraud in connection with the sale of the occupancy agreements; they also accuse various defendants of misconduct in the management of the Village. Plaintiffs' theory of action is nothing more than a garden-variety claim for misrepresentation, anticipatory breach of contract, breach of fiduciary duty, or violation of Missouri consumer protection laws. The proper forum for those claims is the state courts, and the remedy, if any, is under state law.

REASONS FOR GRANTING THE WRIT

I. A DEFINITIVE INTERPRETATION OF THE CIVIL PROVISIONS OF THE RICO ACT BY THIS COURT AT THIS JUNCTURE IS NECESSARY TO CORRECT ERRONEOUS PRECEDENT.

This first en banc consideration of the civil aspects of the Racketeer Influenced and Corrupt Organizations Act presents

substantial issues of law and public policy which call for clarification by the Supreme Court of the United States. Congress drafted the RICO Act to provide additional weapons in the continuing fight against organized crime, *see United States v. Turkette*, 452 U.S. 576 (1981); the decision in this case will determine the use of that Act as a weapon in civil litigation against businessmen who are in no way comparable or related to organized crime. In so doing, this case will set the boundaries for a new basis of federal jurisdiction under which garden-variety civil cases arising under state law may be shoehorned into the already burdened federal courts.

The growing number of cases involving one or more of the issues presented here, and the division among the courts in their results, graphically demonstrate why the Court should grant a writ of certiorari in this case.

The case at hand turns on fundamental questions of application of the civil remedy provision of the RICO Act which will also determine the result in numerous other cases. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982). *See also* Press & Clausen, *The Long Reach of RICO*, Newsweek (Sept. 5, 1983). This case, however, is among those which are getting the jurisprudence of civil RICO off to a false start, and it presents a clear opportunity for this Court to guide the development of the law of civil RICO, as it has guided the development of criminal RICO law in *United States v. Turkette*, 452 U.S. 576 (1981).

A. Summary of Legal Issues — The Target of the Act Is the Importation of Racketeering Funds and Tactics Into the Business Community, and its Treble Damages Remedy Should Not Be Extended to Consumer Fraud Cases.

The Act's substantive provisions speak directly to the investment of tainted funds from criminal enterprises in the legitimate marketplace, and the civil remedy provision aims to divest the criminal of his "ill-gotten gains." *United States v. Turkette*, 452 U.S. at 585.[3] Section 1962(a) prohibits the investment of income from a pattern of racketeering; section 1962(b) prohibits the maintenance of an investment by criminal tactics; and section 1962(c) prohibits the conduct of a business through such tactics. Section 1964(c) provides treble damages for a person "injured in his business or property by reason of a violation" of those sections. 18 U.S.C. § 1964(a). *See Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983).

Prudential's mortgage loan to the Village simply does not fall within these categories. There is not, and could not be, any allegation that the money loaned to the Village by Prudential had been derived from criminal activities; Prudential's loan and mortgage are maintained by ordinary commercial law until the loan is repaid.

Courts have recognized that the broad terms of the statute, if read literally, seem to create a "runaway treble damage bonanza for the already excessively litigious." *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir. 1983), *petition for cert. filed*, No. 83-

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[3] Senator Hruska said that "this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." 116 Cong. Rec. 602 (1970)(remarks of Sen. Hruska)(quoted in *United States v. Turkette*, 452 U.S. at 259 n.13).

539 (U.S. Sept. 29, 1983).[4] The *Bennett* court, like the Seventh Circuit and the Second Circuit but unlike many district judges, misread this Court's ruling in *Turkette* as prohibiting the courts from sensibly setting the parameters of the Act at their intended reach. *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion); *Moss v. Morgan Stanley, Inc.*, No. 83-7120, slip op. at 6342 (2d Cir. Sept. 9, 1983) *Schacht v. Brown*, 711 F.2d at 1353. The court below, therefore, went astray on the threshold question of whether the Act provides a federal cause of action and federal jurisdiction for simple fraud cases.

The definitions in the Act are broad and plain. The definition of "enterprise" includes, for example, "any individual, partnership, corporation, association . . . ," and the definition of "racketeering" lists "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic . . . drugs which is chargeable under state law [and] . . . any act which indictable under any of the following [thirty-one] provisions of title 18, United States Code . . . or any offense involving bankruptcy fraud, fraud in the sale of securities or the felonious manufacture of narcotic drugs . . . ." 18 U.S.C. § 1961(1), (4). Commission of any two of the crimes listed above in a ten year period constitutes the basic component of a "pattern of racketeering." 18 U.S.C. § 1961(5).

When the Act's sweeping definitions are loosely strung together with allegations of interstate commerce and injury, a RICO cause of action has been stated under the *Bennett* rationale. Thus, under the *Bennett* decision, Section 1964(c) creates a new federal cause of action for mail fraud.

Prudential respectfully submits that this Court has the power to formulate a common sense application of the treble damage

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[4] Some of the issues raised in the petition for certiorari filed in *Schacht v. Brown* by the accounting firms and reinsurance company are raised by Petitioner here, a mortgage lender.

provision of the Act which is in accordance with Congress' purpose and which will avoid the unfortunate results of the *Bennett* decision. *United Housing Foundation v. Forman*, 421 U.S. 849 (1975). One element of a sound reading of the RICO Act civil remedies is the concept of racketeering enterprise injury, which reflects the clear statutory purpose to compensate only those whose loss was directly caused by the use of racketeering tactics or funds in the conduct of a business. This point was expressly left undecided by the Second Circuit in *Moss v. Morgan Stanley* and can appropriately be decided by this Court in this case. *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6340 n. 16.

B. The Courts Have Recognized The Undesirability of Overly Literal Application of the Act But Have Erroneously Believed Themselves Helpless to Avoid Those Results Under This Court's Decision in *United States v. Turkette*, 452 U.S. 576 (1981).

The Seventh and Eighth Circuits have erroneously read *Turkette* as precluding the federal courts from setting common sense boundaries to the Act's civil remedies. That reading overlooks this Court's express holdings that the correct interpretation of the Act must be consistent with congressional purpose and that "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. at 580.

In *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), which was decided before *Turkette*, the Eighth Circuit had recognized the danger under the RICO Act of "pervasive intrusion upon state and local law" in the area of criminal prosecution and held that "[c]ertainly Congress did not silently intend such a drastic reshuffle of the federal-state balance . . . ." *United States v. Anderson*, 626 F.2d at 1370.

In *Bennett v. Berg*, the Eighth Circuit panel, however, looked to *Turkette* and said: "Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we

are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. . . . It is beyond our authority to restrict the reach of the statute." *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion).

Similarly, the Seventh Circuit cited *Turkette* in holding that: "The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime." *Schacht v. Brown*, 711 F.2d at 1361 (citing *United States v. Turkette*, 452 U.S. at 586-87).

Prudential respectfully maintains that this Court has the power to interpret federal statutes in accordance with their clear purpose. The question is not one of federalism but one of sound statutory interpretation. This Court has made clear that the literal language of a broad statute need not be slavishly followed if the result would be absurd. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), for example, the Supreme Court expressly refused to permit a suit concerning cooperative housing to be maintained under the securities laws, even though the action could be wedged into the literal language of the statute, where the purpose of the law was not served by the suit. The Court cited the familiar rule that a "thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *United Housing Foundation v. Forman*, 421 U.S. at 849. That rule has been quoted and correctly applied by district courts in dismissing unwarranted RICO cases. *Noland v. Gurley*, 566 F. Supp. at 217; *Adair v. Hunt International Resources Corp.*, 526 F. Supp. at 736, (N.D. Ill. 1981). But see *Schacht v. Brown* 711 F.2d at 1356.

As is discussed below beginning at page 13, a rational guideline to the boundaries of the Act's civil remedies consists in affording a RICO civil remedy only to those who have suffered a racketeering enterprise injury.

C. The *Bennett* Holding Will Increase Radically The Burdens On The Federal Court System By Recognizing A New Basis For Federal Civil Jurisdiction And A New Federal Cause Of Action.

The error of stretching the Act beyond its intended reach can be seen in the drastic effects of such a literal application upon federal jurisdiction and law. It is clear, of course, that Congress intended to create a new cause of action and a federal forum for persons directly injured by organized crime's infiltration and perversion of legitimate business. 18 U.S.C. § 1964(c); *Noland v. Gurley*, 566 F. Supp. at 217-18; *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982) (citing numerous cases). If the Act is construed to provide a remedy only in that well-defined circumstance, then the increased caseload in the federal courts should not be expected to be excessive. If, on the other hand, the Act is interpreted as in the *Bennett* case to create both a new basis for federal jurisdiction and a new federal cause of action for common law fraud, then many plaintiffs will seek relief in federal court rather than in state court. *See Schacht v. Brown*, 711 F.2d at 1353.

The dramatic increase in filed RICO Act cases illustrates "the all-too-prevalent trend of seeking to reshape the [state law] claim into one that can be wrapped in the RICO mantle." *Fields v. The National Republic Bank of Chicago*, 546 F. Supp. 123, at 124. (N.D. Ill. 1982). The Act's civil remedy permits injured persons to recover three times their damages, which provides both an incentive to the plaintiff and a penalty to those who profit from racketeering by depriving them of the fruits of their unlawful activity. Such incentives and penalties serve an entirely laudable purpose in their proper sphere of operation, but unchecked, they will also provide an incentive for lawyers to file their cases under the RICO rubric, where their only real claim reduces to simple fraud or breach of contract. *See Schacht v. Brown*, 711 F.2d at 1353. Thus, in the *Bennett* case, the tenuous

RICO allegation provides the only jurisdictional anchor for pendent claims arising under state common law and consumer protection statutes, such as the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 et seq. (1978). *Bennett v. Berg*, 685 F.2d at 1057; *see e.g. Fields v. National Republic Bank*, 546 F. Supp. at 1353; *North Barrington Development v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980).

If the RICO Act were properly read as denying federal jurisdiction in such cases, the plaintiffs would not be deprived of an adequate remedy, but they would be compelled to seek that remedy in the natural and proper forum, which is the state courts.

Unchecked, the new damages provision and the creation of a new tort under present RICO Act case law will restructure dramatically the landscape of federal practice in a manner wholly unintended and unforeseen by Congress. See *Bankers Trust Company v. Feldesman* No. 82 Civ. 5590, slip op. (S.D.N.Y. June 29, 1983) (available on LEXIS, Genfed Library, Dist. file).

1. The proposed expansion of federal jurisdiction will shift large areas of state civil law into the federal courts.

The circuit courts have read the *Turkette* decision as requiring the courts to "extend the net of the RICO Act to situations which might otherwise find a remedy only in the state courts." *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion).

This Court held in *Turkette* that Congress enacted the Act "knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law." 452 U.S. at 587.

That holding, however, does not lead to the conclusion that a much greater expansion and transformation of state tort law into federal law must be countenanced. First, the *Turkette* decision was in the narrow context of deciding whether the concept of an

enterprise should be limited to legitimate businesses. 452 U.S. at 576.

Second and more importantly, *Turkette* was a criminal case. An action which is a crime under state law may be one element in a RICO offense "*when the requisite elements of a RICO offense are present.*" 452 U.S. at 586 (emphasis supplied). An alleged violation of state law, therefore, may provide a relatively small component in a RICO indictment. In a civil context, however, under a literal reading of the Act, the federal courts will have jurisdiction over ordinary state tort, contract, and consumer litigation. These changes in jurisdiction and remedies will do far more than "alter somewhat the role of the Federal Government."

Third, in *Turkette*, this Court reasoned that "[t]he view was that existing law, state and federal, was not adequate to address the problem which was of national dimensions." 452 U.S. at 586. In enacting the RICO Act, Congress never suggested, however, that state law was inadequate to provide redress for citizens in ordinary commercial disputes or that there existed a problem of national dimensions in that area.

2. The rationale of the *Bennett* case creates a whole new area of federal jurisprudence by giving the victims of numerous federal and state crimes a civil cause of action.

Although the compensation of victims of crime is certainly a laudable purpose, Congress did not intend the RICO Act as a wholesale provision for such compensation. Rather, Congress intended to create a specific remedy for a specific social harm, which was the invasion of the marketplace by those who would use criminal tactics or the ill-gotten fruits of racketeering in the conduct of their businesses. *See, e.g., Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982). As interpreted by the Eighth Circuit, however, the RICO

Act essentially creates a private right of action for all crimes listed under the definition of racketeering.

In applying RICO's treble damages remedy, a distinction should be drawn between the unfortunate victim of a crime and the businessman or other person whose commercial interests were harmed directly by the conduct or funding of a competing business through criminal methods. As Senator Hruska said: "[T]he bill also creates civil remedies, for the honest *businessman* who has been damaged by *unfair competition* from the racketeer businessman. . . . The *legitimate businessman* does not have adequate civil remedies." 115 Cong. Rec. 6993 (1969) (remarks of Sen. Hruska) (emphasis supplied).

The RICO Act, therefore, does not afford a remedy to the plaintiffs here who are, at most, consumers injured by an alleged mail fraud perpetrated on each of them individually, not by the conduct of the Village's affairs through a pattern of racketeering.

3. The *Bennett* decision and other cases will change adversely other aspects of federal practice.

The treble damages provision of the RICO Act provides an unintended incentive for plaintiffs to supplement the usual lawsuits under complex regulatory provisions with a more dramatic RICO action. Such cases as *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982), suggest that the RICO Act can place an entirely new element into the balance of remedial and reform statutes. Thus, in *Thornton*, a union official charged with misconduct in connection with the union pension fund was sued not only under the usual provisions of federal and state laws but under the RICO Act. The *Thornton* court properly refused to entertain that action. *Thornton v. Evans*, 692 F.2d at n.44.

The temptation for plaintiffs to resort to the Act as a weapon in ordinary commercial litigation also can be seen in cases such as *Moss v. Morgan Stanley, Inc.*, No. 83-7120 (2d Cir. Sept. 9, 1983), *Hokama v. E. F. Hutton & Co.*, Fed. Sec. L. Rep.

(CCH) ¶ 99,415 (C.D. Cal. Aug. 5, 1983), and *Cross v. Price Waterhouse & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 99,153 (D.D.C. Apr. 7, 1983) in which the plaintiffs attempted to transform securities cases into RICO actions; *Cenco v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982), in which the plaintiffs attempted to turn a corporate mismanagement case into a RICO action; and *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983), where the RICO claim became a linchpin in a battle for corporate control.

Moreover, the RICO Act's inclusion of mail fraud as an act of racketeering means that plaintiffs may be able to sue for a loss incurred in a securities transaction without meeting the well-known elements of such provisions as Securities and Exchange Commission Rule 10b-5.[5] 17 C.F.R. § 240.106-5; See *Hokama v. E. F. Hutton*, Fed. Sec. L. Rep. ¶ 99,415 at 96,384; Compare Erlbaum v. Erlbaum [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 at 93,921 (E.D. Pa. 1982).

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[5] The concept of fraud under the mail fraud statute is broader somewhat than the common law notion of fraud. 18 U.S.C. §1341 (1976); *United States v. States*, 488 F.2d 761, 764-65 (8th Cir. 1973). The expansive concept of mail fraud can usefully be compared with the prohibitions contained in the Merchandising Practices Act in Missouri. Mo. Rev. Stat. § 407.010 (1978). The mail and wire fraud statutes say that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . uses the mails or wires commits a crime." 18 U.S.C. §§1341. Section 407.020 of the Missouri Merchandising Practices Act, on the other hand, reads in pertinent part as follows:

> The Act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice. . . .

Mo. Rev. Stat. § 407.020 (1978)

As two courts have forcefully noted,

> It is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury. While RICO utilizes and sometimes expands upon the offenses designated as racketeering activities, there is no evidence that it was meant to pre-empt or supplement the remedies already provided by those statutes which define a predicate RICO offense.

Noland v. Gurley, 566 F. Supp. at 218 (quoting *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1007-08).

D. One Workable Criterion For Determining Whether A Claim Falls Within The Act's Treble Damages Provision Is That Of Racketeering Enterprise Injury.

The district courts have developed a flexible and workable criterion for appropriately limiting civil RICO suits to those injured by the use of racketeering funds and methods in business, which is the concept of a racketeering enterprise injury.[6] The court in *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6340, n. 16 collected such cases although it did not decide the issue.

One of the first of these cases was *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, at 209 (E.D. Mich. 1981), where the court agreed that, even if competitive injury is not required, a restrictive interpretation of "racketeering enterprise injury" is appropriate.

In California in 1982, Judge Tashima struck the same theme: "The courts, relying on legislative history, parallels to antitrust law, and policy considerations, have held that treble damages should not be available to plaintiffs whose sole injury stems from

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[6] To the contrary, the *Schacht* court said, "Another major problem with the sort of judicial pruning of RICO's civil provisions, advocated by defendants, where business fraud is alleged is that there is simply no legitimate principled criterion through which to accomplish this distinction." *Schacht v. Brown*, 711 F.2d. at 1356.

the predicate acts of racketeering." *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1006 (footnote omitted); but see *Bennett v. Berg*, 685 F.2d at 1059.

The term "racketeering enterprise injury" is coming to signify the following four judgmental elements:

A. That the term "business or property" at least means commercial or business harm, whether or not it also means competitive harm.

B. That all of the specific elements that are necessary to constitute a violation of RICO must be present.

C. That the injury be "by reason" of the combination of all of these elements, and not merely the proximate result of the predicate acts or even of two or more predicate acts constituting a pattern of racketeering.

D. That the injury must be of the kind the Act was intended to prevent.

Under those elements, plaintiffs' have failed to state a claim under the RICO Act's civil provisions.

E. A Clear Ruling By This Court At This Time Would Promote The Interests Of Justice For The Parties Here And For Other Litigants.

Courts, scholarly commentators, and the popular press have all recognized the potential for unwarranted and coercive litigation created by the widespread civil use of the RICO Act. Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 (1982); Press & Clausen, *The Long Reach of Rico*, Newsweek (Sept. 5, 1983). The very criminals at whom the Act was aimed at least have the protection of the grand jury system. Yet, an ordinary businessman may be made the subject of a well-publicized and embarrassing accusation of having violated the "racketeering act" simply by the filing of a civil complaint.

II. THIS CASE PROVIDES A TIMELY OPPORTUNITY FOR THIS COURT TO RESOLVE THE QUESTIONS CONCERNING THE ACT'S CIVIL REMEDIES, UPON WHICH THE COURTS HAVE DIVERGED.

Only a few of the pending civil RICO cases have reached the appellate level, but the few existing opinions reveal that the circuit court judges are troubled by the question of the scope of the civil provisions of the Act. The district courts have divided sharply on the issue.

A. Contrary to *Schacht, Moss,* and *Bennett,* Some Appellate Courts Have Expressed Doubts About The Scope of Civil RICO.

In a recent case, the Seventh Circuit upheld the district court's decision that "plaintiffs cannot state a claim against these defendants" under the RICO Act. *Thornton v. Evans*, 692 F.2d. at 1064 (7th Cir. 1982). *Thornton* involved a complicated suit by beneficiaries of a union health and welfare fund, alleging a massive conspiracy "to defraud the Fund of millions of dollars . . . . ." 692 F.2d 1064. The court found that the evidence "traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence." *Thornton v. Evans*, 692 F.2d at 1065.

Two circuit courts have expressed serious doubts as to whether the civil provisions of the RICO Act reach ordinary commercial litigation. *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *LTD Commodities Inc. v. Perederij*, 699 F.2d 404 (7th Cir. 1983). In *Dan River*, the Fourth Circuit reversed a district court's grant of a temporary injunction in a hard-fought takeover battle, where that injunction was based in part upon allegations under the Act. The target company's management had attempted to transform its allegations of misconduct under the

securities laws into a RICO Act claim. The court expressed its doubts as follows:

> Finally, we note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problems of corporate control and risk arbitrage.

Dan River, Inc. v. Icahn, 701 F.2d at 291. The Fourth Circuit did not need to decide the RICO issues but observed that the dubious nature of those claims so affected the probability of success as to be one ground for denying a temporary injunction.

The Seventh Circuit followed the same reasoning in *LTD Commodities, Inc. v. Perederij*. In that case, the appellate court sustained Judge Shadur's denial of a temporary injunction based on RICO Act claims. Significantly, Judge Shadur has twice held that the RICO Act civil provisions do not provide a new remedy for ordinary commercial disputes. *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123 (N.D. Ill. 1982); *Salisbury v. Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981). Like the Fourth Circuit, the Seventh Circuit in *LTD Commodities* did not rule on whether the RICO Act could afford a remedy in the circumstances but upheld denial of an injunction based in part on the improbability of such a claim. *LTD Commodities, Inc. v. Perederij*, 699 F.2d at 409. (citations omitted).[7] See also *The*

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[7] In both the *Dan River* and *LTD Commodities* cases, dissents were entered. In *Dan River*, supra, Senior Circuit Judge Butzner wrote "I cannot subscribe to the notion that it is the function of the courts to exclude white collar, corporate crime from the liability imposed by Section 1964(c). Complaints about the scope of the Act should be addressed to Congress." *Dan River, Inc. v. Icahn*, 701 F.2d at 293 (Butzner, J., dissenting). In the *LTD Commodities* case, however, Judge Pell simply noted without discussion that jurisdiction was based on the Act "notwithstanding that the allegations basically concerned an ordinary commercial dispute between contracting businessmen. . . ." *LTD Commodities v. Perederij*, 699 F.2d at 409 (Pell, J., dissenting).

Trane Company v. O'Connor Securities, No. 83-7336, slip op. at 5 (2d Cir. Sept. 19, 1983).

In *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied* 103 S.Ct. 1177 (1982), the Seventh Circuit refused to permit a RICO civil action by a company's auditors against their client. In that case, the auditors allegedly failed to discover and prevent a fraud by Cenco's management. Cenco sued its accountants, who cross-claimed on the ground that they too had been victims of the fraud. The court held that the RICO action was properly dismissed, noting:

> It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

Cenco Inc. v. Seidman & Seidman, 686 F.2d at 457.

Further, in *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983), the Fifth Circuit held that a release which barred various antitrust claims also barred the plaintiff's RICO claims.

Prudential respectfully submits that the case at hand presents an appropriate opportunity for this Court to provide guidance to the lower courts on the scope of civil RICO.

B. The Appellate Courts Have Also Disagreed On The Role Of An Enterprise As A Defendant And Have Not Consistently Applied This Court's Holding In *Turkette*.

In *Turkette*, the Court ruled on the difficult and often-litigated issue of the nature of an enterprise within the meaning of the Act, holding that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." 452 U.S. at 576.

The appellate courts, however, have continued to diverge on the nature of the enterprise and its role in the structure of the

RICO Act. In two cases, the courts had no difficulty in identifying at least one enterprise within the statute's encompassing definition; the difficulty has been the role of the enterprise in the litigation.

In *Bennett*, the en banc Eighth Circuit held that the Village could not simultaneously be an "enterprise" and a "person" who conducts an enterprise; therefore, the plaintiffs' complaint against the Village as a culpable person failed because no separate enterprise was alleged. *Bennett v. Berg*, 710 F.2d. at 1363.

Prudential respectfully submits, as it argued to the court below, that the plain language of the statute does contemplate two separate entities — a person and an enterprise operated by that person — because separate but similar definitions are given for "person" and "enterprise." 18 U.S.C. § 1961(3) and 1961(4). That reasoning is parallel to this Court's in *Turkette*. Yet, if the *Bennett* result is followed, will the civil remedies of the Act effectively divest the enterprise of its ill-gotten gains as this Court has interpreted the purpose of the Act in *Turkette*?[8] *See United States v. Turkette*, 452 U.S. at 585.

The court in *United States v. Hartley*, however, disagreed with the Eighth Circuit, based on its reading of *Turkette* and its observation that the definitions of "person" and "enterprise" overlap, and reasoned that a corporation, for example, could be both an enterprise and a person within the meaning of the Act; a corporation could be both an enterprise and a defendant in a criminal RICO action. *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982). See also *Schacht v. Brown*, 711 F.2d at

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[8] The answer to this question is complicated by the fact that the Village, like the accounting firm in the *Cenco* case, is alleged to have had several roles in the event at issue; it is alleged to have been simultaneously a participant in the frauds; the recipient of the funds obtained by those claimed misrepresentations (and to that degree the beneficiary of the fraud); and also the victim of corporate misconduct by other defendants.

1359-60; *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6344-45.

This ambiguity should properly be resolved by the Supreme Court, and to the extent that the difficulty arises from the language in *Turkette*, the Court can properly issue additional guidance to the lower courts.

C. In Deciding That The Plaintiff Consumers Have Standing, The *Bennett* Court Applied Antitrust Precedent Improperly; The Plaintiffs' Alleged Harm Was Not Caused By A Violation Of The Act.

Prudential respectfully submits, and will argue more fully in its brief to this Court if certiorari is granted, that the plaintiffs do not have standing under the RICO Act.

Since *Turkette* was a criminal case, that decision did not speak directly to the scope of the civil provisions, but the Court said, "The aim is to divest the association of the fruits of its ill-gotten gains." 452 U.S. at 585. The Seventh Circuit looked to *Turkette* and correctly noted that the critical determinant with regard to standing is that " 'the primary purpose of RICO is to cope with the infiltration of legitimate businesses.' " *Cenco Inc. v. Seidman & Seidman*, 686 F.2d at 457 (quoting *United States v. Turkette*, 452 U.S. at 591). From that correct starting point, the Seventh Circuit soundly reasoned that the RICO civil remedy was created for the owners of businesses. The court noted in a passing remark that "perhaps also consumers and competitors" might have a remedy under RICO, although that question was not before the court. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d at 457.

The private civil action provision of the RICO Act was deliberately drafted in the familiar form of the antitrust laws, and both provide a remedy for those whose "business or property" is injured by reason of a violation of the statutes. 18 U.S.C. § 1964(c); *Bennett v. Berg*, 685 F.2d at 1058. In the case of the antitrust laws and the RICO Act, harmonious and clear

development of the decisional law is especially important because the two statutes may well be invoked by the same plaintiffs in the same action. See *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d. 1295 (5th Cir. 1983).

The Eighth Circuit declined to follow antitrust precedent on the issue of standing, and the panel said:

> We acknowledge that RICO was intended in part to combat the threat posed by racketeer influences in the free market system ... In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade.

Bennett v. Berg, 685 F.2d. at 1059; (citations omitted). *See also Schacht v. Brown*, 711 F.2d. at 1357.

Not surprisingly, therefore, the Eighth Circuit's reasoning on the issue of standing conflicts with this Court's decisions in *Blue Shield of Virginia v. McCready*, 457 U.S. 465; 73 L. Ed. 2d 149 (1982), and *Reiter v. Sonotone*, 442 U.S. 330 (1979). In *Reiter v. Sonotone*, for example, the Court held that a purchaser of a hearing aid had standing under the Clayton Act if the price was "artificially inflated *by reason of the anticompetitive conduct complained of*...." 442 U.S. at 339 (emphasis added). Similarly, in *Blue Shield v. McCready*, the Court noted that "it bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration." 73 L.Ed. 2d at 160, n.13. In that case, the court looked to the "physical and economic nexus between the alleged violation and the harm to the plaintiff and ... more particularly to the relationship of the injury alleged with those forms of injury about which Congress was likely to be concerned." *Blue Shield v. McCready*, 73 L. Ed. 2d at 160.

If the RICO Act is interpreted analogously to the Clayton Act, the plaintiffs here lack standing. They have not been injured in their business, and their only alleged property injury, unlike the plaintiffs in *Blue Shield v. McCready* or *Reiter v. Sonotone*, was not caused by conduct proscribed by the Act. *See also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As the court noted in *Van Schaick v. Church of Scientology*,

> Yet we believe that ["business or property"] must be read with the statute's primary purpose — to protect legitimate businesses from infiltration by racketeers — in mind. Thus, in construing "property" courts should be sensitive to the statute's commercial orientation and to Congress' obvious intention to restrict the plaintiff class. We do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962.

Van Schaick v. Church of Scientology, 535 F. Supp. at 1135-37. (*citing Salisbury v. Chapman*, 527 F. Supp. 577; *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207).

The plaintiffs do not run the Village as their business, nor do they own a competing retirement community, so they cannot be said to have been injured in their "business."[9] The plaintiffs are not the owners of the Village, nor are they investors in it; their occupancy agreements may not be transferred or inherited. To the extent their contracts are being performed, the plaintiffs' only allegation resembling a property loss is that the value of those contracts has decreased because of mismanagement and corporate misconduct at the Village. *Bennett v. Berg*, 685 F.2d. at 1058. Thus, their alleged loss flows from an entirely different

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[9] The plaintiffs' case can be compared with that of *Spencer Cos. v. Agency Rent-a-Car, Inc.*, F. Sec. L. Rep. (CCH) ¶ 98,361 (D. Mass. 1981), where the court held that a RICO (civil) claim was stated by plaintiffs who alleged a business injury caused by defendants' use of racketeering activity to acquire an interest in their business.

cause and is only indirectly related to the alleged mail fraud or violation of the Act.[10]

D. The Term "Associated With" Should Not Be Read To Include A Mortgage Lender.

The en banc Eighth Circuit held that a mortgage lender was "associated with" an enterprise within the meaning of the statute but went on to hold that such association alone was not sufficient for liability under the Act. Rather, the court correctly held that the Act also requires that a person "associated with" an enterprise also "participate in the conduct of the affairs of an enterprise through a pattern of racketeering." *Bennett v. Berg*, 710 F.2d. at 1364.

Prudential respectfully maintains that the latter holding was correct but that the court below misread the term "associated with." Section 1964(c) prohibits anyone "employed by or associated with" an enterprise from conducting its affairs through criminal methods. Thus, under the rule of *eiusdem generis*, the term "associated with" should be read to encompass relationships analogous to employment, such as agency, and not to include other business or social relationships.

Prudential is indisputably not an employee of the Village, and its only "association with" the Village is its status as a mortgage lender. If plaintiffs are correct, any lender who exercises any oversight of its borrowers' finances, which is certainly a common activity in substantial loans, may be sued by a customer of the borrower because that borrower was mismanaged. Certainly,

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[10] Further, the plaintiffs in the case at hand allege that they were fraudulently induced to buy their occupancy agreements; even if that were so, and even if they were harmed thereby, which is denied, each plaintiff was harmed only by one individual, underlying, misrepresentation, not by the operation of the Village through a repeated pattern of racketeering or by the investment of ill-gotten funds in the Village. Indeed, the plaintiffs here complain that their contracts are worth less than they had hoped because the Village was mismanaged; any loss that they have suffered was not caused by the alleged fraud at all, but by simple corporate misconduct.

there is no evidence that in enacting RICO Congress elevated such a theory to the status of a federal treble damage action. This court should therefore not read the "associated with" element to include wholly legitimate lending relationships.

Finally, Prudential observes that the decision in *Bennett* is consistent with that in *Schacht* on the question of association but inconsistent on the question of participation. *Bennett v. Berg*, 710 F.2d at 1364; *Schacht v. Brown*, 711 F.2d. at 1360. Thus, Prudential agrees with the petitioners in *Schacht* that the *Bennett* decision on the latter point is correct and that certiorari should be granted to resolve the conflict.

E. The District Courts Have Disagreed Even More Widely Than The Circuit Courts On The Basic Issues At Stake Here.

The district courts are divided on the core question of whether and in what form the RICO Act will expand federal jurisdiction and create a federal common law action for fraud.

Some of the district courts have met the issue head on and simply held that the RICO Act was not intended to, and does not, so radically change existing law. In Massachusetts in 1982, Judge Garrity said: "They [cases cited] have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state court." *Van Schaick v. Church of Scientology*, 535 F. Supp. at 1136 (citing *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206 (E.D. Mich. 1981); *Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981); *Adair v. Hunt International Resources*, 526 F. Supp. 736 (N.D. Ill. 1981)).

In the *Van Schaick* case, Judge Garrity persuasively argued:

> We do not believe that Congress intended § 1964(c) to afford a remedy to every consumer who could trace a product to a violation. . . . Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum.

Van Schaick v. Church of Scientology, 535 F. Supp. at 1011. Plaintiffs' case here is precisely the sort of consumer action rejected there.

In *Waterman Steamship Corp.*, the district court reconsidered its first decision on the issue of a RICO cause of action for garden-variety fraud, saying at last:

> To give RICO the broad and unlimited application suggested by [plaintiff] in this case would be to make a travesty of Congress' clear intent to the contrary. *The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their business in interstate commerce into treble damages RICO actions.*

Waterman Steamship Corp. v. Avondale Shipyards, Inc., 627 F. Supp. at 260 (emphasis added).

Similarly in *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 (N.D. Ill. 1982), the court rejected its earlier holding in the same case, *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645 (N.D. Ill. 1980). In the second *Parnes* case, Judge Shadur put it this way: "But on the civil side the judicial responses have often reflected an uneasiness with RICO's possible swallowing up of all common law fraud, a clearly unintended result reached in a clearly unintended way." 548 F. Supp. at 23. The court reaffirmed its belief in the correctness of

that reasoning when it expressly rejected a plaintiff's attempt to reshape a state law claim into one that "can be wrapped in the RICO mantle." *Fields v. The National Republic Bank*, 546 F. Supp. at 124. Similarly in *Salisbury v. Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981), the same court dismissed a RICO Act claim based on fraudulent nondisclosure. *See also Adair v. Hunt* 526 F. Supp. at 748.[11]

On the other hand, some district courts have held that the literal language of the RICO Act does create a federal remedy for fraud. *See, e.g., Glushband v. Benjamin*, 530 F. Supp. 240 (S.D.N.Y. 1981); and *Dean's Materials Inc. v. Borneman*, 1981 Trade Cases) (CCH) ¶ 64,690 (N.D. Ca. October 21, 1981).

The tension between the well-known and relatively narrow purposes of the Act and its broad language is nowhere more apparent than on the issue of whether the involvement of organized crime is a necessary element in a civil RICO cause of action.

On the one hand, the Supreme Court and the appellate courts have uniformly recognized that Congress' purpose was to deprive organized crime of its financial base. *Bennett* v. *Berg*, 685 F.2d at 1059. On the other hand, the legislative history reveals that Congress deliberately did not use the term "organized crime" in the language of the Act, in part because of the fear that such usage would create an unconstitutional status crime. *Bennett v. Berg*, 685 F.2d at 1063.

One of the first civil RICO cases held that in light of the legislative history's "frequent references to 'racketeers', 'organized crime' and 'organized crime families,' " a cause of action could not be stated against a defendant who "cannot be so characterized." *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109

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[11] The decisions in *Schacht v. Brown* and *Moss v. Morgan Stanley*, of course, may cast doubt on the continued validity of these and district court cases in their respective.

(S.D.N.Y. 1975); Accord *Adair* v. *Hunt*, 526 F. Supp. at 747-8. Although that rule was criticized, some district courts have once again adopted analogous constructions of the civil provisions of the Act. See, e.g. *Hokama v. E. F. Hutton*, Fed. Sec. L. Rep. § 99, 415, at 96, 384-85. But see *Moss v. Morgan Stanley*, No. 83-7120, slip op. (2d Cir. Sept. 9, 1983)

The panel here recognized that judicial and scholarly opinion has been divided on the question of whether a link to organized crime must be alleged under the RICO Act's civil provisions, and it declined to read that element into the statute, citing and discussing numerous cases and articles. *Bennett v. Berg*, 685 F.2d at 1063.

Regardless of whether an allegation of organized criminal involvement is a necessary element of a RICO civil action, the civil provisions of the Act can and should be interpreted to achieve Congress' purposes. Prudential respectfully suggests that a RICO civil suit should not be sustained unless the wrong complained of and the alleged injury suffered are of the kind that the Act was intended to prevent. Only persons who have suffered a racketeering enterprise injury should be afforded a civil remedy under the Act.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In summary, Prudential advances the following three reasons in support of its petition for a grant of certiorari in this case:

1. Unless and until this Court decrees otherwise, the federal courts will be flooded by treble damage claims which are alternately (a) based on nothing more than state common law actions; (b) designed to recover damages for a new federal hybrid action; or (c) simply added to damage claims under existing federal statutes.

2. This case presents in clear-cut and definitive form the principal questions of application of the civil provisions of the RICO Act upon which the courts have diverged; the Court should utilize this opportunity to provide badly needed guidance

on the proper construction and application of *civil* RICO, as it did for *criminal* RICO in *United States* v. *Turkette*, through correcting the erroneous reversal of the District Court by the Eighth Circuit Court of Appeals.

3. This case presents an opportunity for the development of flexible, workable criteria for claims under Section 1964(c) of the RICO Act. Under the racketeering enterprise injury standard, among others, the Act's severe civil remedies will be directed at their intended target and not deflected into unintended areas of federal jurisdiction and law.

CONCLUSION

For the reasons given above, Petitioner The Prudential Insurance Company of America respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

TITLE 18, U.S.C.

CHAPTER 96 - RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

SEC.

§ 1961. *Definitions*

As used in this chapter —

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in

part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. *Prohibited activities*

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in

which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. *Criminal penalties*

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General.

The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

§ 1964. *Civil remedies*

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying

the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. *Venue and process*

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. *Expedition of actions*

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A

copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

§ 1967. *Evidence*

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. *Civil investigative demand*

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the

introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default

or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon

such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.